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IN THE

Supreme Court Of The United States

No. 483

PEARL DETENBER, Administratrix of
the estate of Terry Detenber, deceased
and
VIOLA B. TOWNSEND, Administratrix
of the estate of Richard Mattingly, deceased - Petitoners

vs.

AMERICAN UNIVERSAL INSURANCE CO. - Respondent

PETITION FOR REHEARING OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RAYMOND C. STEPHENSON
310 West Liberty Street
Louisville, Kentucky 40202

JOSEPHINE P. HUGHETT
314 Armory Place
Louisville, Kentucky 40202

HARRY L. HARGADON
1916 Kentucky Home Life Building
Louisville, Kentucky 40202

HENRY G. FISCHER
1735 DeSales Street, N.W.
Washington, D.C. 20036

LAWYERS PRINTING CO., LOUISVILLE, KENTUCKY

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Reasons For Granting The Petition For Rehearing and Directing The Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit:	
1. The Kentucky Court of Appeals on November 24, 1967, overruled the Petition For Rehearing and issued mandate affirming verdict of jury in the case of State Farm Mutual Insurance Co. v. Marcum, et al., Ky., 420 S.W.2d 113. The opinion of the Court appeared in print for the first time in the December 12, 1967 issue of South Western Reporter.	3–4
2. The decision of the Kentucky Court of Appeals in the case of State Farm Mutual Ins. Co. v. Marcum, et al., Ky., 420 S.W.2d 113, is an intervening circumstance of substantial and controlling effect pursuant to Rule 58 of this Court, in that it declares:	3–4
(1) The insurer, as a professional defender of lawsuits, is held to a standard higher than that of an unskilled practitioner.	3
(2) It is proper to submit the claims of bad faith or negligence to the jury under appropriate instructions.	3
3. The petitioner's right to trial by jury under the Seventh Amendment of the Constitu-	

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IN THE

SUPREME COURT OF THE UNITED STATES

No._____

PEARL DETENBER, Administratrix of the estate of Terry Detenber, deceased
and
VIOLA B. TOWNSEND, Administratrix of the estate of Richard Mattingly, deceased - - - - - - *Petitioners*

vs.

AMERICAN UNIVERSAL INSURANCE CO. - *Respondent*

PETITION FOR REHEARING ON DENIAL OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, Pearl Detenber, Administratrix of the Estate of Terry Detenber, deceased, and Viola B. Townsend, Administratrix of the estate of Richard Mattingly, deceased, respectfully pray for rehearing on this Court's order of December 4, 1967, denying their petition for Writ of Certiorari, to review a final

decision of the United States Court of Appeals for the Sixth Circuit rendered on February 9, 1967, a petition for rehearing having been denied on April 12, 1967.

THE QUESTIONS PRESENTED

1. Has there been an intervening circumstance of substantial or controlling effect since the order denying the petition for a writ of certiorari on December 4, 1967?

2. Are there other substantial grounds available to petitioner although not previously presented?

RULES INVOLVED

The rule involved in this petition for rehearing of denial of writ of certiorari is Rule 58 of the Supreme Court Rules, which is printed in Appendix A infra at Pages 7-8.

REASONS FOR GRANTING THE REHEARING

Rule 58 of the Rules of the Supreme Court provide for petitions for rehearing and confine the grounds to:

> (1) . . . Intervening circumstances of substantial or controlling effect . . .

In the footnote to the rules the cases of Sanitary Refrig. Co. v. Winters, 280 U.S. 30, 34 footnote 1, and Massey v. U. S., 291 U.S. 608 are given as examples.

> (2) . . . or to other substantial grounds avail-

able to the petitioner although not previously presented.

The footnote to the rules refer to the case of Shriber Schroth Co v. Cleveland Trust Co., 305 U.S. 47, 50.

I. We respectfully submit that there has been an intervening circumstance of substantial and controlling effect since the order of this Court entered on December 4, 1967 in that the Kentucky Court of Appeals gave a final decision by overruling the Petition for Rehearing and issuing its Mandate affirming the verdict of the jury in the case of State Farm Mutual Auto Ins., Co. v. Marcum, et al., Ky., 420 S.W.2d 113, on November 24, 1967, and the case appeared in print in the South Western Reporter System for the first time in the December 12, 1967 issue. The order of this Court was entered on December 4, 1967.

The opinion of the Sixth Circuit was rendered on February 9, 1967, and is in clear unequivocal conflict with the law of Kentucky as determined by the intervening case of State Farm Mutual Auto Ins. Co. v. Marcum, et al., Ky., 420 S.W.2d 113. The law of Kentucky is that (1) an insurer, as a professional defender of lawsuits is held to a standard of care higher than that of an unskilled practitioner, (2) the insurer is liable for actionable bad faith or negligence in handling the insured's case, (3) a jury verdict for the insured will be upheld where there is evidence that the insurer conducted the handling of the claim against the insured according to the insurer's interest and not the insured, resulting in an excess verdict.

Such conduct is held in State Farm Mutual Auto Ins. Co. v. Marcum, et al. (supra), to be substantial evidence of bad faith. The District Court and the Court of Appeals hold contrariwise in the case at bar.

II. We respectfully submit that ground 2 under Rule 58 is likewise available to the petitioners in that we in our petition did not present to the Court the right of the Petitioners to a trial by jury guaranteed by the Seventh Amendment to the Constitution.

We join in the dissenting opinion of Mr. Justice Black and for want of ability to express it better, and with all proper respect, adopt his language that the action of the District Court and the Court of Appeals was:

> "... in flagrant disregard of the right of trial by jury guaranteed by the Seventh Amendment to the Constitution."

The Kentucky Court of Appeals in the above quoted case of State Farm Mutual Auto Ins. Co. v. Marcum, et al., reasons the same as Mr. Justice Black. It interprets Harrod v. Meridian Mutual Ins. Co., Ky., 389 S.W.2d 74, in the same manner as Mr. Justice Black and under this Marcum case the Kentucky Court of Appeals would undoubtedly also say:

> "... I cannot see how this evidence of bad faith on the part of the Insurance Company lawyer can be considered insufficient to make a case for the jury."

On a reading of the Kentucky Court of Appeals

decision in "Marcum", we submit the Kentucky Court would now also say:

> "This record establishes for me a rather convincing case of bad faith; at the very least I think a jury of 12 ordinary men with a common sense understanding of such matters, could reasonably conclude that the insurance company's conduct in this case amounted to conscious wrongdoing. By ordering summary judgment for the defendant, the Courts below simply imposed their own motions as to the most plausible inference to be drawn from this record, thereby denying the plaintiffs their constitutionally protected right to have their case decided by 12 ordinary citizens."

We respectfully submit that the opinion of the District Court and the Court of Appeals is in conflict not only with the law of Kentucky as declared in the following cases:

State Farm Mutual Auto Ins. Co. v. Marcum, et al., Ky., 420 S.W.2d 113

American Surety Co. of N. Y. v. J. F. Schneider & Son, Inc.,Ky., 307 S.W.2d 192

Fidelity & Casualty Co. of N. Y. v. Stewart Dry Goods Co., 208 Ky. 429, 271 S.W. 444, 43 ALR 318

Georgia Casualty Co. v. Mann, 242 Ky. 447, 46 S.W.2d 777

Harrod v. Meridian Mutual Ins. Co., Ky., 389 S.W.2d 74.

It is also in conflict with United States Fidelity &

Guaranty Co. v. Canale, (C.A. 6) 257 F.2d 138, as well as Brown v. United States Fidelity and Guaranty Co., (C.A. 2) 314 F.2d 675, and other Circuits and State Appeals Courts in cases heretofore cited in Petitioners' Petition for Writ of Certiorari.

CONCLUSION

For the reasons stated, the Petition for Rehearing should be sustained and the Petition for Writ of Certiorari should be granted.

RAYMOND C. STEPHENSON
310 West Liberty
Louisville, Kentucky 40202

JOSEPHINE P. HUGHETT
314 Armory Place
Louisville, Kentucky 40202

HARRY L. HARGADON
1916 Kentucky Home Life Building
Louisville, Kentucky 40202

HENRY G. FISHER
1735 DeSales Street, N. W.
Washington, D. C. 20036

APPENDIX A

RULE 58 OF THE UNITED STATES SUPREME COURT

Rehearings

1. A petition for rehearing of judgments or decisions other than those denying or granting certiorari, may be filed with the Clerk in term time or in vacation, within twenty-five days after judgment or decision, unless the time is shortened or enlarged by the court or a justice thereof. Such petition must briefly and distinctly state its grounds; it must be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay; it must be printed in conformity with Rule 39; and forty copies, one of which shall bear the manuscript signature of counsel to the certificate, must be filed, accompanied by proof of service as prescribed by Rule 33. A petition for rehearing is not subject to oral argument, and will not be granted, except at the instance of a justice who concurred in the judgment or decision and with the concurrence of a majority of the court.

2. A petition for rehearing of orders on petitions for writs of certiorari may be filed with the clerk in term time or vacation, subject to the requirements respecting time, printing, number of copies furnished, manuscript signature of certificate, and service, as provided in paragraph 1 of this rule. Any petition filed under this paragraph must briefly and distinctly state grounds which are confined to intervening circumstances of substantial or controlling effect (e. g., Sanitary Refrigerator Co. v. Winters, 280 U.S. 30, 34 footnote 1, 50 S.Ct. 9, 10; Massey v. United States, 291 U.S.

608, 54 S.Ct. 532), or to other substantial grounds available to petitioner although not previously presented (e.g., Schriber-Schroth Co. v. Cleveland Trust Co., 305 U.S. 47, 50, 59 S.Ct. 8, 9). Such petition is not subject to oral arguments. A petition for rehearing filed under this paragraph must be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay, and counsel must also certify that the petition is restricted to the grounds above specified.

3. No reply to a petition for rehearing will be received unless requested by the court. No petition for rehearing will be granted in the absence of such a request and an opportunity to submit a reply in response thereto.

4. Consecutive petitions for rehearings, and petitions for rehearing that are out of time under this rule, will not be received.

APPENDIX B

AMENDMENT VII UNITED STATES CONSTITUTION

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.